

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

original w/ affidavit of mailing
74-2426

To be argued by
PETER C. SALERNO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2426

CARRIE L. HAZZARD,

Plaintiff-Appellant,

—v.—

CASPAR WEINBERGER, SEYMOUR FIER, BRENDAN BYRNES, WILLIAM F. HYLAND, WILLIAM T. SOMMERS, H. A. MCGOWAN, JAMES A. ALLOWAY, JOHN A. MCGARRITY, JOHN J. SPIELBERGER, MALCOLM WILSON, LOUIS J. LEFKOWITZ, ALBERT D'ANTONI, ROBERT F. BARRECA, FRANK MORGANO, JOSEPH V. TERRENZIO, DR. E. A. STERN, MARTIN WALTERS, DONALD ALEXANDER, ABRAHAM BEAME, JULES M. SUGARMAN, MARTTIE LOUIS THOMPSON, ROBERT PILLER, W. D. ULLRICH, individually and in their official capacities,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES WEINBERGER, FIER, SPIELBERGER and ALEXANDER

PAUL J. CURRAN,

United States Attorney for the
Southern District of New York,
Attorney for Defendants-Appellees
Weinberger, Fier, Spielberger and
Alexander.

PETER C. SALERNO,
WILLIAM S. BRANDT,
Assistant United States Attorneys,
Of Counsel.



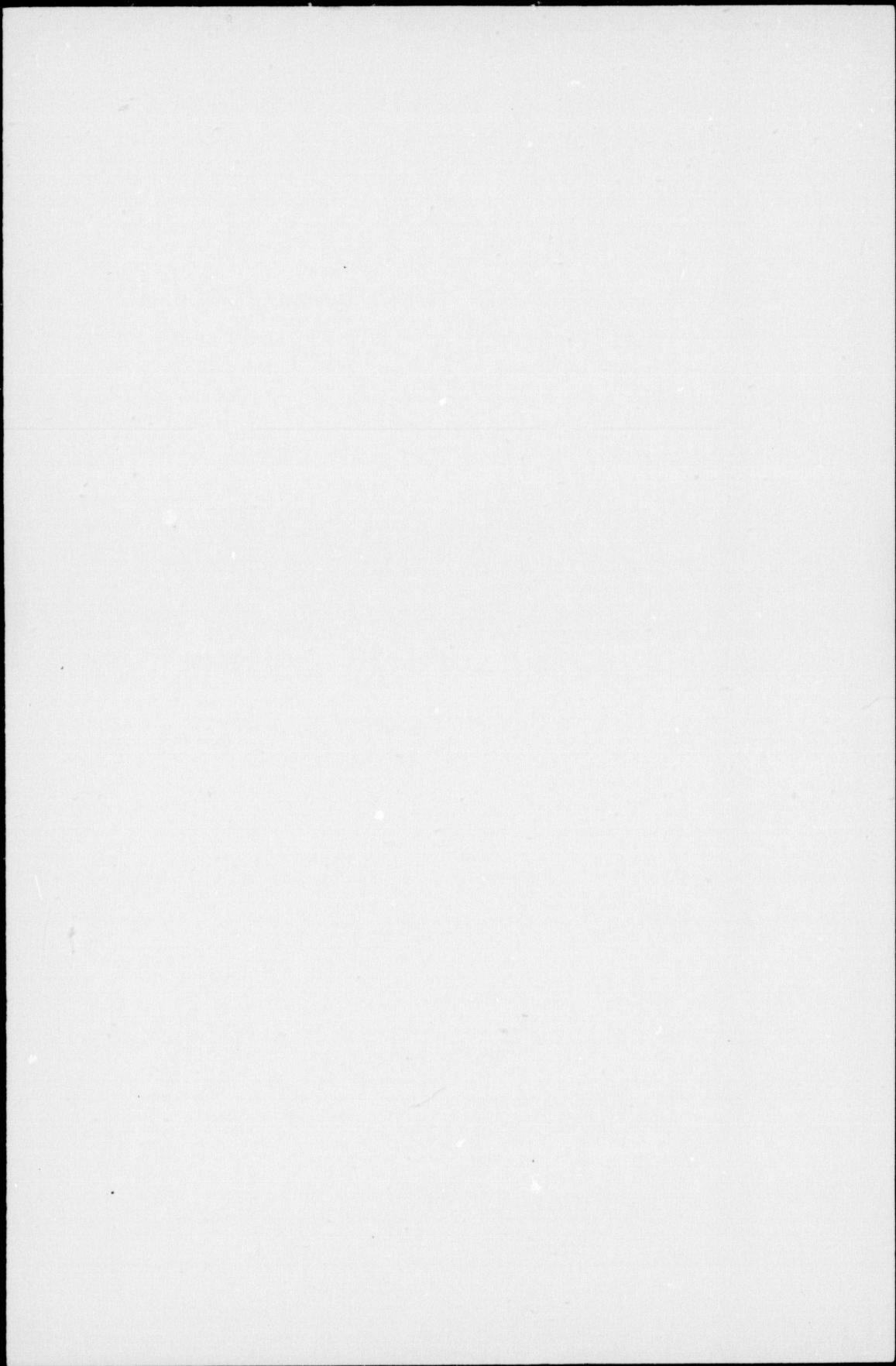


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
The Facts	2
Issues Presented	6
ARGUMENT:	
The District Court was correct in dismissing the complaint for lack of subject matter jurisdiction....	6
A. The Social Security Claims	6
B. The Tax Claim	8
C. The Conspiracy Claims	9
CONCLUSION	11

TABLE OF AUTHORITIES

Cases:

<i>Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics</i> , 456 F.2d 1339 (2d Cir. 1972)	9
<i>Bomer v. Ribicoff</i> , 304 F.2d 427 (6th Cir. 1962)	7
<i>Coy v. Folsom</i> , 228 F.2d 276 (3rd Cir. 1955)	7
<i>Ensey v. Richardson</i> , 469 F.2d 664 (9th Cir. 1972)	7
<i>Franklin v. Zuber</i> , 56 F.R.D. 601 (S.D.N.Y. 1972)	10
<i>Hazzard v. Hotel Commodore, Social Security Administration, et al.</i> , 72 Civ. 746 (S.D.N.Y. December 5, 1972), application for leave to proceed in forma pauperis denied sub nom. <i>Hazzard v. Social Security Administration</i> , Docket No. 73-1045 (2d Cir. April 19, 1973), rehearing denied (2d Cir. May 24, 1973), cert. denied, 414 U.S. 1134, rehearing denied, 415 U.S. 986 (1974), appeal dismissed (2d Cir. May 21, 1974)	3, 4, 8

	PAGE
<i>Mondschein v. United States</i> , 338 F. Supp. 786 (E.D. N.Y. 1971), <i>aff'd on opinion below</i> , 469 F.2d 1394 (2d Cir. 1973)	8
<i>Powell v. Jarvis</i> , 460 F.2d 551 (2d Cir. 1972)	9
<i>Powell v. Workmen's Compensation Board</i> , 327 F.2d 131 (2d Cir. 1964)	9
<i>Small v. Gardner</i> , 390 F.2d 186 (1st Cir.), <i>cert. denied</i> , 393 U.S. 984 (1968)	7
<i>United States v. Rochelle</i> , 363 F.2d 225 (5th Cir. 1966)	8
<i>United States v. Sherwood</i> , 312 U.S. 584 (1941)	7
 <i>Statutes:</i>	
26 U.S.C. § 6511(a) (1970)	9
26 U.S.C. § 7422(a) (1970)	5, 8
42 U.S.C. § 401 <i>et seq.</i> (1970)	2
42 U.S.C. § 405 (1970)	3, 7
42 U.S.C. § 1983 (1970)	9
 <i>Regulations:</i>	
20 C.F.R. §§ 404.909-954 (1974)	7
 <i>Court Rule:</i>	
Rule 24(a), Fed. R. App. Proc.	4

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-2426

CARRIE L. HAZZARD,

Plaintiff-Appellant,

—v.—

CASPAR WEINBERGER, SEYMOUR FIER, BRENDAN BYRNES,
WILLIAM F. HYLAND, WILLIAM T. SOMMERS, H. A. MCGOWAN,
JAMES A. ALLOWAY, JOHN A. MCGARRITY, JOHN J. SPIELBERGER,
MALCOLM WILSON, LOUIS J. LEFKOWITZ, ALBERT D'ANTONI,
ROBERT F. BARRECA, FRANK MORGANO, JOSEPH V. TERRENZIO,
DR. E. A. STERN, MARTIN WALTERS, DONALD ALEXANDER,
ABRAHAM BEAME, JULES M. SUGARMAN, MARTTIE LOUIS THOMPSON,
ROBERT PILLER, W. D. ULLRICH, individually and in their official capacities,

Defendants-Appellees.

**BRIEF FOR DEFENDANTS-APPELLEES WEINBERGER,
FIER, SPIELBERGER and ALEXANDER**

Preliminary Statement

Carrie L. Hazzard ("Mrs. Hazzard") appeals from an Order of the Honorable Milton Pollack of the United States District Court for the Southern District of New York, filed September 27, 1974, dismissing her complaint in its entirety.*

* Judge Pollack's opinion is reported at 382 F. Supp. 225.

This brief is submitted on behalf of the four federal officials who were sued in the District Court: Caspar Weinberger, the Secretary of Health, Education and Welfare ("Weinberger"); Seymour Fier, an Administrative Law Judge in the Social Security Administration ("Fier"); John J. Spielberger, a Group Manager in the Intelligence Division in the office of the District Director of Internal Revenue in Newark, New Jersey ("Spielberger"); and Donald Alexander, the Commissioner of Internal Revenue ("Alexander") (collectively referred to as the "federal appellees").*

The Facts

The complaint in this action, filed on May 14, 1974, alleges a general conspiracy among all the appellees to deprive Mrs. Hazzard of various constitutional rights. As to the appellees Weinberger and Fier, both officials of the Department of Health, Education and Welfare, Mrs. Hazzard claims that she has been wrongfully denied disability insurance benefits and disabled widow's insurance benefits under Title II of the Social Security Act, 42 U.S.C. § 401 *et seq.* (1970). The complaint fails to make concrete allegations against the appellees Spielberger and Alexander, though the District Court construed part of it as a claim for a tax refund.**

* On July 8, 1974 Mrs. Hazzard filed a purported "Amendment to Complaint" that named as an additional party Mr. Alvin J. Arnett (cited in the amendment as "Arness"), a former National Director of the Office of Economic Opportunity ("O.E.O."). Neither the amendment nor the original complaint alleged any facts against Mr. Arnett, and neither he nor the national office of O.E.O. were served with process.

** 382 F. Supp. at 228.

The Claim Against Appellees Weinberger and Fier

Mrs. Hazzard first applied for a period of disability and disability insurance benefits on February 26, 1969. The claim was denied both initially and upon reconsideration. At Mrs. Hazzard's request, a hearing was held, and on July 27, 1970, appellee Fier issued a decision unfavorable to Mrs. Hazzard. The Appeals Council of the Social Security Administration affirmed this decision and notified Mrs. Hazzard on June 10, 1971.

Mrs. Hazzard applied for disabled widow's benefits in 1970. This application was denied initially on July 27, 1971, and Mrs. Hazzard took no further action with respect to it. (Cook Affidavit, Document No. 26, Exhibit A).*

On February 23, 1972, Mrs. Hazzard commenced a *pro se* civil action, ostensibly to review the above determinations. The Honorable Marvin E. Frankel dismissed the portion of the complaint concerning Social Security benefits on the ground that the action was not commenced within 60 days of a final decision of the Secretary, as required by 42 U.S.C. § 405(g), (h) (1970), and that the Court therefore lacked jurisdiction of the subject matter. *Hazzard v. Hotel Commodore*, 72 Civ. 746 (S.D.N.Y. December 5, 1972) (Document No. 26, Exhibit C).

Mrs. Hazzard filed a notice of appeal from Judge Frankel's decision. Judge Frankel certified, on January 23, 1973, that the "appeal is not taken in good faith" within

* In support of their motion to dismiss in the District Court, the federal appellees submitted the affidavit of Assistant United States Attorney Peter C. Salerno, with several exhibits attached. These papers are collectively indexed in the record on this appeal as document No. 26, and are so referred to in this brief. The Cook affidavit is Exhibit A to the Salerno affidavit.

the meaning of Rule 24(a), F. R. App. Proc. Mrs. Hazzard's application for leave to proceed *in forma pauperis* was denied. *Hazzard v. Social Security Administration*, Docket No. 73-1045 (2d Cir. April 19, 1973), *rehearing denied* (2d Cir. May 24, 1973), *cert. denied*, 414 U.S. 1134, *rehearing denied*, 415 U.S. 986 (1974). Thereafter, her substantive appeal from Judge Frankel's decision was dismissed for failure to file a brief within nine months (2d Cir. May 21, 1974).

On April 26 and May 6, 1974, prior to commencing this action, Mrs. Hazzard filed two new applications for benefits with the Social Security Administration. At the time of the District Court's decision in the instant case, no decision on those applications had been rendered. 382 F. Supp. at 228.*

Appellees Weinberger and Fier moved to dismiss the complaint on the following grounds: 1) Review of the final denial dated June 10, 1971 was time-barred as well as barred by the doctrine of *res judicata*. 2) Review of the presently pending applications and of the decision dated July 27, 1971 was barred by Mrs. Hazzard's failure to exhaust her administrative remedies. The District Court so ruled: "As to each [Social Security] claim [Mrs. Hazzard] has either failed to exhaust her administrative remedies or has failed to bring her civil action within sixty days after final disallowance by the Administration." 382 F. Supp. at 228.

* In November, 1974, after this appeal was filed, Mrs. Hazzard received initial denials of these applications.

The Claims Against Appellees Spielberger and Alexander

Alexander is not mentioned in the complaint. Spielberger, among others, allegedly "is the cause of all the trouble," and is allegedly guilty of "collusion . . . in the falsification of plaintiff's spouse, Wesley Hazzard's work, or personal records, regarding his income and withholding taxes." (Complaint ¶¶ 11, 32[5]).

There is a statement at page 12 of the complaint which Spielberger, Alexander and the District Court treated as a claim for a tax refund. The complaint did not allege, however, that Mrs. Hazzard had filed a timely claim for a refund, which is a prerequisite to a tax refund action. 26 U.S.C. § 7422(a).^{*} The District Court dismissed the refund claim on this ground. 382 F. Supp. at 228. Mrs. Hazzard's brief on this appeal makes no mention whatever of appellees Spielberger and Alexander or of any tax claim.

The Conspiracy Claims

Mrs. Hazzard's complaint contained many general, conclusory allegations of a conspiracy to deprive her of various constitutional rights (*E.g.*, Complaint ¶¶ 4, 5, 8, 10). Judge Pollack found that these allegations were too vague and conclusory to confer jurisdiction. 382 F. Supp. at 228.

^{*} In her reply to the appellees' motion to the District Court, Mrs. Hazzard did not contest their assertion that she failed to file a timely claim for refund.

Issues Presented

Did the District Court properly dismiss the complaint for lack of subject matter jurisdiction:

(a) as to appellees Weinberger and Fier, on the ground that Mrs. Hazzard's claims were either time-barred or barred by her failure to exhaust administrative remedies;

(b) as to appellees Spielberg and Alexander, on the ground that she failed to show that she had filed a timely refund claim;

(c) as to all four federal officials, on the ground that the conspiracy allegations were too vague to confer jurisdiction?

ARGUMENT

The District Court was correct in dismissing the complaint for lack of subject matter jurisdiction.

A. The Social Security Claims

Mrs. Hazzard received a final denial from the Appeals Council of the Social Security Administration on June 10, 1971, with respect to her first application for disability benefits. She also received an initial denial of her claim for disabled widow's benefits on July 27, 1971, and never pursued her administrative appellate remedies. Finally she filed two applications in 1974, which had not reached the initial decision stage at the time of the District Court's decision in the instant case.

Judicial review of decisions respecting Social Security benefits is limited to final decisions of the Secretary of Health, Education and Welfare after a hearing, and suits seeking such review must be commenced within sixty days of that decision. The relevant statutory provisions are as follows:

"(g) Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow.

* * * * *

(h) The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. *No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided.* No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter."

42 U.S.C. § 405 (1970) (emphasis added).

These provisions permitting suit against the Secretary of Health, Education and Welfare are a waiver of sovereign immunity. Failure to comply with their terms deprives the District Court of subject matter jurisdiction. *E.g., United States v. Sherwood*, 312 U.S. 584, 586-87 (1941); *Small v. Gardner*, 390 F.2d 186 (1st Cir.), *cert. denied*, 393 U.S. 984 (1968); *Bomer v. Ribicoff*, 304 F.2d 427 (6th Cir. 1962).

A final, reviewable decision of the Secretary can be obtained only by exhausting the administrative process of reconsideration of an initial denial, hearing before an administrative law judge, and review by the Appeals Council of the Social Security Administration. 20 C.F.R. §§ 404.909-954 (1974); *Ensey v. Richardson*, 469 F.2d 664, 666 (9th Cir. 1972); *Coy v. Folsom*, 228 F.2d 276, 280 (3d Cir. 1955). The only final decision ever obtained by Mrs. Hazzard was

the denial by the Appeals Council on June 10, 1971 of her application for disability benefits. Her previous attempt to review this denial in court was untimely. *Hazzard v. Hotel Commodore*, 72 Civ. 746 (S.D.N.Y. December 5, 1972). *A fortiori*, the present attempt is time-barred.

Mrs. Hazzard's first application for disabled widow's benefits, which was initially denied July 27, 1971, was never pursued to the Appeals Council level, so there is no final decision to review. The same is true of her applications filed April 26 and May 6, 1974, which resulted in initial denials in November 1974.

B. The Tax Claim

The following statement, at page 12 of Mrs. Hazzard's complaint in this action, was treated as a claim for a tax refund by the District Court and by appellees Spielberger and Alexander:

"I had a tax audit in 1967 while working for the Paris Hotel, my salary was garnished, because Mr. Walters failed to report my earnings for the summer of 1965. I had to pay taxes for the summer of 1964 and 1965, \$221.00 because both hotels took out withholding taxes but failed to report it; I notified the Internal Revenue Service nothing was done. Plaintiff want [*sic*] to be reimbursed with interest because the income tax collectors, collect interest up to 25% on delinquent taxes."

A timely refund claim, filed with the Internal Revenue Service, is a jurisdictional prerequisite to a refund action in district court. 26 U.S.C. § 7422(a); *Mondschein v. United States*, 338 F. Supp. 786 (E.D.N.Y. 1971), *aff'd on opinion below*, 469 F.2d 1394 (2d Cir. 1973); *United States v. Rochelle*, 363 F.2d 225, 231 (5th Cir. 1966). The burden is on the taxpayer to establish that a timely claim was filed. *United States v. Rochelle*, *supra*, 363 F.2d at 231 n.11.

For a claim to be timely, it must be filed within three years from the time the tax return was filed or two years from the time the tax was paid. 26 U.S.C. § 6511(a). In the instant case this period expired in 1969, since according to the complaint Mrs. Hazzard's audit, and apparently the payments for those years, occurred in 1967. The complaint neither alleged that timely claims were filed, nor did Mrs. Hazzard, in the District Court, produce evidence of such filing in response to Government affidavits to the effect that no records of her filing such a claim existed.

Although Mrs. Hazzard fails to raise the issue of the tax claims on this appeal, clearly the District Court was correct when it found: "Plaintiff has failed to allege the filing of a tax claim with the Internal Revenue Service; thus this Court is without jurisdiction to consider her quest for a tax refund." 382 F. Supp. at 228.

C. The Conspiracy Claims

The District Court properly found that the conspiracy claims of the complaint were too vague and conclusory to confer jurisdiction, citing *Powell v. Jarvis*, 460 F.2d 551 (2d Cir. 1972) and *Powell v. Workmen's Compensation Board*, 327 F.2d 131 (2d Cir. 1964). See 382 F. Supp. at 228. *Powell v. Workmen's Compensation Board* held that "vague and conclusionary allegations respecting the existence of a conspiracy" are insufficient to state a claim under 42 U.S.C. § 1983,* and noted that the defendants' actions in that case appeared merely to be "the normal administrative processes of adjudication and appeal." 327 F.2d at 137.

* An action against a federal official for violations of constitutional rights is analogous to an action against state officials under 42 U.S.C. § 1983. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339, 1346 (2d Cir. 1972).

The conspiracy allegations of Mrs. Hazzard's complaint are exemplified by the following:

"[T]he defendants of the State of New York, also conspired with the Federal defendants in denying plaintiff her 'equal protection of the law' 'acting under color of state law' and with malice and forethought also denied plaintiff due process of the law." (Complaint, ¶ 4).

This and other passages in the complaint (*e.g.*, ¶¶ 5, 8, 10) merely state conclusions— they do not rise to the level of a constitutional claim.

"While we recognize that in the modern federal practice a complaint which supports a claim for relief on any theory should be sustained, . . . we cannot validate complaints against public officials which literally say nothing except by way of conclusion."

Franklin v. Zuber, 56 F.R.D. 601, 603 (S.D.N.Y. 1972) (Gurfein, J.) (citation omitted).

CONCLUSION

The order of the District Court dismissing the complaint with respect to the federal appellees should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for Defendants-Appellees
Weinberger, Fier, Spielberger and
Alexander.*

PETER C. SALERNO,
WILLIAM S. BRANDT,
*Assistant United States Attorneys,
Of Counsel.*

January, 1975

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Pauline Troia,
being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the 8th day of
January 19 75 she served ^{2 copies} ~~a copy~~ of the within
govt's brief on appeal

by placing the same in a properly postpaid franked envelope
addressed:

- 1) Carrie L. Hazzard, 15 St. James Place, NY NY 10038
- 2) Martin Walter, Esq., 150 West End Ave. NY NY 10023
- 3) Gladstein & Isaac, Esqs., 127 John St. NY NY 10038
- 4) Bower & Gardner, Esqs., 415 Madison Ave. NY NY 10017
- 5) Louis J. Lefkowitz, Esq., 2 World Trade Center, NY NY 10047
Attn: Lillian Z. Cohen,
- 6) Adrian P. Burke, Esq., Corp Counsel, Municipal Bldg, NY NY 10007
- 7) Morris, Duffy, Ivone & Jensen, Esqs., 233 Bway NY NY 10007
- 8) William F. Hyland, Esq., State House Annex, Trenton, NJ 08625
Attn: Prudence H. Bisbee, Esq.,
- 9) Mellen, Donnelly & Fogarty, Esqs., 335 Broadway, NY NY 10013

And deponent further says
she sealed the said envelope and placed the same in the
mail chute drop for mailing in the United States Courthouse,
Foley Square, Borough of Manhattan, City of New York.

Pauline Troia

Sworn to before me this

8th day of January 1975

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1975